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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1922

No. 283

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY (a corporation) and SOUTHERN PACIFIC RAILROAD COMPANY (a corporation),
Respondents.

MOTION TO ADVANCE CAUSE.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1922

No. 984

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY (a corporation) and SOUTHERN PACIFIC RAILROAD COMPANY (a corporation),
Respondents.

MOTION TO ADVANCE CAUSE.

Both parties herein join in moving this Honorable Court to advance this cause for hearing as near the beginning of the October Term of 1923 as may be convenient. In support of this motion, the following brief statement of the matter involved and of the reasons for this application are respectfully submitted.

FACTS AND ISSUES.

The Railroad Commission of the State of California acting pursuant to the provisions of a statute of California known as the Public Utilities Act found after public hearings and the taking of evidence, that public convenience and necessity require the construction jointly by three carriers, the Southern Pacific, the Santa Fe and the Los Angeles & Salt Lake Railroads, of a new union passenger depot in the City of Los Angeles. In the same order and upon similar findings of public convenience and necessity, the Commission ordered the elimination of seventeen (17) specified grade crossings of the Southern Pacific line in the City of Los Angeles by the cessation of train operations, longitudinally, of trains along and upon Alameda Street and the elimination of six (6) specified grade crossings of the Santa Fe and Salt Lake lines by the construction of viaducts.

The Supreme Court of California, in a proceeding under the laws of California for a judicial review of the orders of the Railroad Commission, ruled that the authority vested in the State Railroad Commission by the Public Utilities Act (Cal. Stat. 1915, Chap. 91), to require the railroads to do the things specified in the order, has been superseded by the enactment of the Transportation Act of 1920, amendatory to the Interstate Commerce Act.

Following this decision of the State Supreme Court, a petition for certiorari was presented to

this Honorable Court on the 16th day of April, 1922 and granted by an order made herein the 23rd day of April, 1922.

The issue thus presented is one of jurisdiction.

GENERAL PUBLIC INTEREST INVOLVED.

The question is of general interest, both to the railroads throughout the United States and to the Interstate Commerce Commission and the various State Commissions exercising regulatory powers over public utilities. Since the institution of this proceeding before this Honorable Court, it has been called to attention that similar cases have arisen in Oklahoma, South Dakota and Louisiana. Several State Commissions have indicated their interest in this question and the National Association of Railway and Utilities Commissioners, representing all State Commissions, has instructed its general solicitor to ask the permission of this Honorable Court to participate in this case, as amicus curiae, for the purpose of presenting the views of the association on this question of jurisdiction.

The Interstate Commerce Commission is also confronted with the same question of jurisdiction which is now before this Honorable Court for final determination. After the decision by the Supreme Court of California, the City of Los Angeles filed a complaint before the Interstate Commerce Commission invoking its powers to order the erection, by

the three railroads in question, of a union passenger depot in Los Angeles. It seems clear that the decision by this Honorable Court of the case at bar should precede any final action by the Interstate Commerce Commission on the complaint of the City of Los Angeles.

Los Angeles is a rapidly growing community of more than 600,000 population. The question of improved depot facilities has been under consideration by the Railroad Commission of California since 1916. Pending the final and authoritative determination by this Honorable Court of the question of jurisdiction here involved, no comprehensive plans can be adopted and carried into effect by the carriers or by the State of California or the City of Los Angeles to meet the transportation needs of the traveling public in Los Angeles.

By reason of the importance and very general interest in the question here presented, we respectfully join in asking that this case be advanced for hearing.

Dated, San Francisco,
May 26, 1923.

Respectfully submitted,

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1923

No. 284

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY (a corporation),
Respondent.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR PETITIONER.

HUGH GORDON,
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RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
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vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY (a corporation),
Respondent.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR PETITIONER.

There is involved in these proceedings the question of the validity of an order of the Railroad Commission of California directing three railroads (the Southern Pa-

cific, the Santa Fe and the Salt Lake) to join in the erection of a new union passenger depot and the elimination of certain grade crossings in the City of Los Angeles.

The facts in the case, together with a map showing the location of the three railroads in Los Angeles, the area within which a union depot was ordered to be erected, and also the location of the grade crossings proposed to be eliminated, are set forth in the petition for writ of certiorari and brief in support thereof on file in these proceedings. It is deemed unnecessary, therefore, to repeat at length the facts and circumstances out of which the case arose.

I.

THE PRIMARY ISSUE OF JURISDICTION.

The Railroad Commission based its order upon specific findings that public convenience and necessity requiring the erection of a union depot both as a means for more adequate railroad facilities and as a measure essential to the elimination of certain dangerous grade crossings. The Supreme Court of California, in a judicial review of the Commission's order, concluded that complete jurisdiction to determine the necessity for the erection of new railroad facilities was vested in the Interstate Commerce Commission by the provisions of the Transportation Act of 1920, and that the power of the Railroad Commission under the laws of California to make the order in question had been superseded by this assump-

tion of broader jurisdiction by the Interstate Commerce Commission.

The state court based this decision upon section 15a, section 5, section 1, subdivisions 18 to 22, inclusive, and section 3 of the Interstate Commerce Act as amended in 1920, holding that these particular sections had deprived the State Commission of the power it previously had to make the order under review. Each of these sections of the act is discussed and a complete argument on the question of jurisdiction is presented in petitioner's brief in support of the petition for writ of certiorari herein. An extended reargument upon this phase of the case is deemed unnecessary here.

Supplementing the points already presented and in order to show more clearly that the Commission's order did not contravene any of the sections of the Interstate Commerce Act relied upon by the state court, we desire to set forth in summary form an exact statement of what the order of the Railroad Commission does and does not do.

What the Commission's order requires:

1. The procurement jointly by the three carriers of grounds for a union depot within the area specified.

2. The filing of plans and specifications jointly by the three carriers for the construction of an adequate union passenger depot. (Provisions were made in the order as to apportionment of cost and time of construction.)

3. The actual construction of the depot in accordance with such plans.

4. The elimination of 17 specified grade crossings on the Southern Pacific line by the cessation of train operations longitudinally at grade along and upon a certain street (Alameda Street).

5. The elimination of 6 specified grade crossings on the Santa Fe and Salt Lake lines by the construction of viaducts.

The order does not require:

1. The construction or extension of any line of railroad.

2. The abandonment of any line of railroad.

3. The use by one railroad of the terminal facilities or main line and other trackage of another railroad.

4. The formulation of a plan for consolidated railroad systems.

5. The acquisition of facilities for the interchange of traffic.

6. The emergency utilization of cars or of terminal properties.

7. The regulation of car service.

The Commission's order is set forth in full on pages 146 to 150, inclusive of the transcript of record.

We respectfully submit that the Supreme Court of California erred in its interpretation of the Commission's order, and also, in the application and construction of the provisions of the Interstate Commerce Act.

II.

POINTS RAISED BY THE SUPPLEMENTAL RECORD.

It was originally intended that the issue of jurisdiction presented by the petition for certiorari and the transcript of record filed therewith should be the sole issue submitted in these proceedings. Attention has later been directed to certain decisions of this honorable court which have led counsel to conclude that it was proper to submit a supplemental stipulated record containing so much of the transcript of evidence presented to the court below as might be necessary for a complete consideration by the Supreme Court of all points in the case, involving the alleged denial of rights under the Federal Constitution even though these points were not passed upon by the court below.

Southern Railway Co. et al. v. Watts, 260 U. S. 192, 193;

Atlantic Coast Line R. Co. v. Daughton, (decided June 4, 1923) U. S. Supt. Ct. Adv. Op. 67 L. ed. No. 17, p. 681.

Greene v. Louisville & Interurban R. Co., 244 U. S. 499.

Appleby v. Buffalo, 221 U. S. 524, 529.

There has, therefore, been filed a supplemental record, consisting of selected portions of the transcript of testimony and certain important exhibits which counsel have stipulated shall constitute the entire record on review.

The following questions arising from facts set forth in this supplemental record were presented to the state court:

1. Was the Commission's finding that public convenience and necessity require the erection of a union depot consistent with, and supported by, the evidence?

2. Were the Commission's findings on questions of public convenience and necessity final and conclusive under the California law?

3. Has the Commission, under the police power of the state, authority to order the railroads to erect a union depot as an essential measure for the elimination of dangerous grade crossings?

4. Does the Commission's order, in requiring the construction and use of the new union depot and the abandonment of the present facilities deprive the railroads of property in violation of the guarantees under the Federal Constitution?

5. Does the Commission's requirement that the operation of trains on Alameda Street be eliminated after the construction of the union depot, impair the obligation of a contract contained in a certain franchise permitting the railroads to operate trains on Alameda Street?

6. Is the Commission's order invalid because it may require the railroads to expend large sums of money and to exercise the power of eminent domain in acquiring the necessary land and constructing a union depot?

These questions were not passed upon by the Supreme Court of California, the court holding that "this disposition of the primary inquiry" (the Federal question of jurisdiction) "renders unnecessary a discussion of the several subsidiary questions presented for our consideration by the briefs of counsel herein." Assuming that it

is proper to present for consideration all of the issues involved in the proceedings under review, we respectfully submit herewith the following argument upon these questions.

1. Was the Commission's finding that public convenience and necessity require the operation of a union depot consistent with, and supported by, the evidence?

The Commission's order was based upon four specific findings of fact:

(a) The Commission found that existing grade crossings (naming them) are unsafe, and that the continued use of these crossings, by the movement of trains by the respective carriers using such crossings, endangers the employees of the carriers and the public generally, and that public interest, safety, convenience and necessity require that such dangerous conditions be eliminated.

Included in the crossings enumerated by this finding are the 17 crossings of the Southern Pacific line on Alameda Street. The correctness of this finding of fact has never been disputed.

(b) The Commission found that the existing passenger station of the Santa Fe and Salt Lake railroads "are improper, inadequate and insufficient", and that the existing depot of the Southern Pacific Company "does not conform to the plan for the elimination of dangerous railroad crossings in the City of Los Angeles."

(c) The Commission found that in order to eliminate the dangerous grade crossings enumerated and to provide adequate and sufficient passenger station facilities for the three railroads in question "it is necessary and

the public safety, convenience and necessity require that a new structure or structures, to-wit: a union passenger station and buildings incidental thereto, be erected" by the respondent railroads, and that in connection therewith such improvements and changes in existing facilities of said railroads be made as might be reasonably necessary and incidental to the use of the union passenger station "and that all railroad traffic be eliminated from Alameda Street, between College Street and 15th Street, inclusive, in the City of Los Angeles, except local freight switching".

(d) The Commission found that public safety, convenience and necessity require that the location and site of the union passenger station referred to in the foregoing findings be within a designated area approximately one-half mile square within the City of Los Angeles.

This area is traversed by the main lines of two of the carriers, and is separated from the main line of the third carrier by a dry river bed less than 200 yards wide.

As shown by the supplemental transcript of record on file herein, the Commission's hearings and investigations preceding its findings involved a period of some four years. At its numerous hearings, in which many days' time was consumed, and printed transcripts of testimony of approximately 3000 pages compiled, the Commission heard evidence upon all questions involved in the above findings. In addition to the final report compiled by the

Commission's engineering department (Commission's Exhibit No. 1 filed herein with the supplemental record), plans were compiled and submitted by four engineers of prominence and unquestioned standing. These engineers also testified at the hearings, and excerpts from their testimony are contained in the supplemental transcript of record filed herein.

The questions involved in the above findings were largely questions requiring expert opinion. Four engineers, including the chief engineer of the Railroad Commission, testified definitely that a union depot was essential both for the proper elimination of grade crossings and for the convenience of the traveling public; that continued use of the present Southern Pacific depot was inconsistent with an adequate plan for the elimination of grade crossings; that the Santa Fe and Salt Lake depots were both inadequate and inconveniently located, and that the site of the union depot should be at or near the place finally selected and designated by the Commission. These engineers were Mr. Hawgood, Mr. Storrow, Mr. Barnard and the chief engineer of the Railroad Commission, Mr. Sachse. Mr. Hawgood's testimony will be found beginning on pages 316 and 353; Mr. Storrow's on pages 258 and 543; Mr. Barnard's on page 340, and Mr. Sachse's on pages 423 and 534 of the supplemental transcript of record. Also, the summary of this testimony and the various plans proposed are set forth in the report of the Commission's Engineering Department (Commission's Exhibit No. 1).

In addition to the evidence just referred to, the Commission made a complete inspection of the premises in

the presence of all of the parties and under the guidance of some of the engineers (including the respondents' engineers), who appeared as witnesses. The record of this inspection is also set forth in the supplemental transcript of record, beginning page 573. Such a view of the premises alone was sufficient to support the Commission's finding.

Boesche v. City of Naperville, (Ill.) 48 N. E. 1061;

Trustees of Schools of Lake Co. v. Griffith, 105 N. E. 760;

City of Tacoma v. Hansen, 110 Pac. 426;

Lewis Em. Dom., Vol. II, Sec. 776.

The necessity for the elimination of train operations on Alameda Street was recognized by the Southern Pacific and Salt Lake railroads, whose application for the establishment of a union depot at the present site of the Southern Pacific station was heard in connection with the proceedings resulting in the Commission's order. (Application No. 3346, Transcript of Record, p. 31, Supplemental Transcript, Appendix 544-572.) These two railroads urged the acceptance of their plan for the union depot instead of that finally adopted by the Commission. It was rejected, however, not only because it did not include the Santa Fe, but also because it afforded only a partial solution of the difficulties sought to be eliminated.

We respectfully submit that the supplemental record filed herein shows that the Commission's findings of fact, in all respects, were not inconsistent with, but on the contrary, were fully supported by, the evidence.

2. Were the Commission's findings on questions of public convenience and necessity final and conclusive under the California law?

The provision under the laws of California for judicial review of the Commission's orders is contained in California Statutes, 1915, Chapter 91 (The Public Utilities Act), section 67 of which reads as follows:

> "67. Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the Supreme Court of his state for a writ of certiorari or review (hereinafter referred to as a writ of review) for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined. Such writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown the same be continued. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of California. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination. The commission and each party to the action or proceeding before the commission shall have the right

> to appear in the review proceeding. Upon the hearing, the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure of this State relating to writs of review shall, so far as applicable and not in conflict with the provisions of this act, apply to proceedings instituted in the Supreme Court under the provisions of this section. No court of this state (except the Supreme Court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decisioin of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; *provided*, that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases."

It is to be noted that the above statute specifically provides that "the findings and conclusions of the Commission on questions of fact shall be final and not subject to review". In numerous decisions rendered both before and after the decision in the cases under review, the Supreme Court of California has recognized the force and validity of this provision as to the conclusiveness of the Commission's findings.

In the case of *Oro Electric Corp'n. v. Railroad Commission*, 169 Cal. 466, the California Supreme Court affirmed an order of the Railroad Commission denying the Oro Electric Corporation a certificate of public convenience and necessity to construct certain electric lines. Discussing the question of the Commission's finding of fact, and citing section 67 of the Public Utilities Act, the court said:

"Here the Commission found the ultimate fact that the public convenience and necessity did not require the exercise of the privileges in controversy, and neither the sufficiency of the evidence, nor the soundness of the reasoning, upon which that finding was based, can be considered in this proceeding."

Similar rulings were made in the following cases:

Clemmons v. Railroad Commission, 173 Cal. 254, 258;

Sexton v. Atchison, Topeka & Santa Fe Ry. Co., 173 Cal. 760;

San Leandro v. Railroad Commission, 183 Cal. 229, 239.

In the recent case of *Live Oak Water Users Assn. v. Railroad Commission,* Vol. 66 Cal. Dec. (Advance sheets) p. 408 (decided September 21, 1923), the Supreme Court of California again upheld the validity of section 67 of the Public Utilities Act, quoting in italics that portion of the statute, which provides that:

"The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review."

In this case the California court supported its construction of section 67 of the Public Utilities Act by a reference to the decision of this honorable court and a quotation therefrom in the case of *Penn. R. R. Co. v. International Coal Mining Co.,* 230 U. S. 184, as follows:

" 'Under the statute there are many acts of the carrier which are lawful or unlawful according as

> they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rates with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body, so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals.'"

It thus appears that section 67 and the decisions of the California Supreme Court construing it are consistent with the principles enunciated by this honorable court in the case of *New York & Queens Gas Co. v. McCall*, 245 U. S. 345, 347, 351,

> "The court of appeals of New York decided that the Public Service Commission was created to perform the important function of supervising and regulating the business of public service corporations; that the state law assumes that the experience of the members of the Commission especially fits them for dealing with the problems presented by the duties and activities of such corporations; that the courts, in reviewing the action of the Commission, have no authority to substitute their judgment as to what is reasonable in a given case for that of the Commission, but are limited to determining whether the action complained of was capricious or arbitrary and for this reason unlawful; and that it was clearly within the power of the Commission to make the order which is here assailed.

"This interpretation of the statutes of New York is conclusive, and the definition, thus announced, of the power of the courts of that state to review the decision of the Public Service Commission, based as it is in part on the decision in Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 452, 470, 54 L. ed. 280, 287, 30 Sup. Ct. Rep. 155, differs but slightly, if at all, from the definition by this court of its own power to review the decisions of similar administrative bodies, arrived at in many cases in which such decisions have been under examination. Typical cases are: Baltimore & O. R. Co. v. United States, 215 U. S. 481-494, 54 L. ed. 292-297, 30 Sup. Ct. Rep. 164; Kansas City Southern R. Co. v. United States, 231 U. S. 423, 443, 444, 58 L. ed. 296, 304, 305, 52 L. R. A. (N. S.) 1, 34 Sup. Ct. Rep. 125; Railroad Commission v. Cumberland Teleph. & Teleg. Co., 212 U. S. 414, 420, 422, 53 L. ed. 577, 580, 581, 29 Sup. Ct. Rep. 357; Interstate Commerce Commission v. Union P. R. Co., 222 U. S. 541-547, 56 L. ed. 308-311, 32 Sup. Ct. Rep. 108; and Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 668, 56 L. ed. 594, 604, 32 Sup. Ct. Rep. 389.

"It is the result of these and similar decisions, that while in such cases as we have here this Court is confined to the Federal question involved, and therefore has not the authority to substitute its judgment for that of an administrative commission as to the wisdom or policy of an order complained of, and will not analyze or balance the evidence which was before the Commission for the purpose of determining whether it preponderates for or against the conclusion arrived at, yet it will, nevertheless, enter upon such an examination of the record as may be necessary to determine whether the Federal constitutional right claimed has been denied; as, in this case, whether there was such a want of hearing or such arbitrary or capricious

actions on the part of the Commission as to violate the due process clause of the Constitution.

"* * * and we agree with the court of appeals of New York in concluding that the action of the Commission complained of was not arbitrary or capricious, but was based on very substantial evidence, and therefore that, even if the courts differed with the Commission as to the expediency or wisdom of the order, they are without authority to substitute for its judgment their views of what may be reasonable or wise."

However, notwithstanding section 67 of the Public Utilities Act and its own prior decisions, the California court in the particular cases under review failed to follow the undoubted principle of law above set forth. The state court while basing its decision primarily on the question of Federal jurisdiction above discussed, did, however, refer briefly to the Commission's findings in the following language:

"The respondents also urge the contention that since this court has decided in the case of Civic Center Association v. Railroad Commission, *supra*, that the Railroad Commission of California had jurisdiction to make and enforce orders providing for the elimination of those certain grade crossings involved, in part, in the proceedings before the Railroad Commission; and since the said commission had found and held in said proceedings that the establishment of a union terminal depot was an indispensable element in accomplishing the elimination of said grade crossings, the commission had the power to include in its order for the elimination of such grade crossings, the creation of such union terminal depot. There is no merit in this contention, for the reason, very aptly set forth in the extract above quoted from the decision of the New York Court of Appeals in the case of

> People etc. v. Public Service Commission, *supra*. It is also without merit for the further reason that notwithstanding the views expressed by the Railroad Commission in its findings and conclusions in the proceeding herein presented for review, we can perceive no indispensable relation between the elimination of grade crossings and the establishment of union depot facilities, nor can we see any insurmountable difficulty why jurisdiction over the matter of eliminating grade crossings may not be exercised in a proper case consistently, and it may be concurrently, with the exercise of the authority which is vested by the Act of Congress of 1920 in the Interstate Commerce Commission over the subject of union terminal depot facilities."

Thus, the state court has apparently rendered a decision contrary to those previously rendered and contrary to the principle followed by this honorable court. In this respect, we respectfully submit, the Supreme Court of California has erred.

3. Has the Commission under the police power of the state authority to order the railroads to erect a union depot as an essential measure for the elimination of dangerous grade crossings?

The Commission found, as above set forth, that a union depot was an essential measure for the elimination of grade crossings.

The primary object of the present proceeding is the protection of the people from the hazardous railroad grade crossings now existing in Los Angeles. This can only be accomplished by virtue of the police power of the state. That power has not been, and without a constitutional amendment *cannot be taken away* by any

legislation which Congress could enact. It is inviolably reserved to the states.

Gibbons v. Ogden, 9 Wheat. 1, 203; 6 L. ed. 23, 72;
United States v. DeWitt, 9 Wall. 41; 19 L. ed. 593;
Slaughter House cases, 16 Wall. 36, 62; 21 L. ed. 394, 404;
Patterson v. Kentucky, 97 U. S. 501-503; 24 L. ed. 1115, 1116;
Hamilton v. Kentucky Distilleries & W. Co., 251 U. S. 146, 156;
Cooley Const. Lim., 574;
Hammer v. Dogenhart, 247 U. S. 251.

It is true that Congress has enacted laws requiring safety appliances, headlights, etc., on all trains used in interstate commerce. The purpose of these laws is primarily to protect travelers and employees *on trains*. They are enacted under the power to regulate commerce. But the power to *regulate commerce* has nothing to do with the power to protect the citizen who uses the street crossing but who may never ride on a train. The latter power can only be exercised by the state.

If it should be said that the power of the state to protect the public using the streets conflicts with the operations of interstate carriers which also used the streets, then it must be answered that as to such conflict *the power of the state is supreme*. This was the holding of the United States Supreme Court in the recent case of *Erie Railroad v. Board of Public Utility Commissioners*, 254 U. S. 394; 65 L. ed. 322. In that case the court said, relative to an order of a state

commission requiring a carrier engaged in interstate commerce to abolish grade crossings:

"But it is argued that the order is unreasonable in the circumstances to which we have adverted, the principle applied to the regulation of public service corporations being invoked. Mississippi R. Commission v. Mobile & O. R. Co., 244 U. S. 388, 391, 61 L. ed. 1216, 1219, 37 Sup. Ct. Rep. 602; Chicago, B. & Q. R. Co. v. Railroad Commission, 237 U. S. 220, 59 L. ed. 926, P. U. R. 1915 C, 309, 35 Sup. Ct. Rep. 560. But the extent of the states' power varies in different cases from absolute to qualified, somewhat as the privilege in respect of inflicting pecuniary damage varies. The power of the state over grade crossings derives little light from cases on the power to regulate trains.

"Grade crossings call for a necessary adjustment of two conflicting interests,—that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power: * * * neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the

soil. Denver & R. G. R. Co. v. Denver, 250 U. S. 241, 246, 63 L. ed. 958, 962, 39 Sup. Ct. Rep. 450."

Upon this authority we think that jurisdiction of the California Commission to require the complete elimination by interstate carriers, of grade crossings in the City of Los Angeles is unassailable, even though, as the Commission found, it is necessary to require the carriers to erect a union station in order to accomplish such elimination.

4. Does the Commission's order, in requiring the construction and use of the new union depot and the abandonment of the present facilities deprive railroads of property in violation of the guarantees under the Federal Constitution?

It was urged by respondents that the order requires the carriers to abandon large areas of land and to "destroy and scrap" adequate facilities of great value without making any provision for reimbursing them for the loss.

The evidence shows and the Commission found that the depots of the Salt Lake and Santa Fe were inadequate as facilities for passenger service and that the Southern Pacific depot was inadequate in that it failed to conform to any reasonable plan for the elimination of grade crossings. The evidence also shows that the Southern Pacific station, though of modern type, is located on a narrow site with restricted approach tracks making it really inadequate as a passenger facility. Finally there is the ultimate finding of the Commission that public necessity requires a *union depot*.

An order requiring the construction of a union depot necessarily carries with it the requirement that existing facilities be abandoned. If there is any public necessity for the union station then the abandonment of existing facilities is justified and there is no unconstitutional taking. Nearly every union depot case found in the reports has involved the abandonment of existing facilities, sometimes adequate and sometimes inadequate.

In the case of *Railroad Commission v. No. Ala. Ry.*, 62 So. 749-752, the railroads made the same objection, i. e. that requiring them to abandon existing facilities would be a taking of private property for public use without compensation.

The Supreme Court of Alabama said:

> "So long as the Commission acts within the rule above stated (referring to a matter not here involved), its orders in exercising the police power of the state is not violative of the state or federal constitutions as to condemning property without due process notwithstanding the railroad may lose the use of the old building or the use of the lot as a location for its passenger depot. It acquired the lot and erected the building with a full knowledge of and subject to the police power of the state."

In the case of *Railroad Commission v. Ala. Gt. So. Ry.*, 64 So. 13, a similar contention was made. We quote:

> "It is also contended by the railroad companies that the order of the Railroad Commission is void in that the order of the Railroad Commission requires each railroad company to abandon presently

> occupied depot facilities in the City of Bessemer, and to build, in conjunction with others, a union depot, whereas, the act authorizing the Railroad Commission to require the construction of a union depot does not authorize the Commission to compel the abandonment of depot and depot facilities, already erected and in use."

The order was nevertheless upheld as being "out of respect to public needs" and therefore "violative of no principle of constitutional law" (p. 16). And also on the ground that, "If the state has the power to which we have referred (the authority to require all railroad companies operating railroads within a city to use a union passenger station at that point), then it has the corresponding power to put that power into exercise" (p. 18). The "corresponding power" referred to includes the power to require the abandonment of existing depots.

The Supreme Court of Texas in *State v. St. L. & So. W. Ry.*, 165 S. W. 491-8, a union depot case, held as follows:

> "The statute explicitly grants the commission the power to require railroads to erect union depots, and this carries with it, by necessary implication, every power necessary to the accomplishment of such object."

To the same effect is the case of

Dewey v. At. Coast Line Ry., 55 S. E. 292; 142 N. C. 392.

In the case of *Gulf O. & S. F. Ry. Co.' v. State*, 167 S. W. 192, a union depot case, the findings were that one of the railroads,

> "owns and operates a depot * * * which depot is old and inadequate for the reasonable needs of said place; said *depot is situated so as to be reasonably convenient and accessible* to the citizens having occasion to use the same"

and that the other railroad depot

> "is reasonably convenient and accessible to the people of Celeste."

It was also found that a

> "union depot, if constructed at the junction of the two roads, would be reasonably convenient and accessible to the people of Celeste."

Under these findings the Supreme Court of Texas upheld the order requiring the erection of the union depot and the abandonment of existing depots *one of which was adequate.*

To the same effect see *Mayor etc. of Worcester v. Norwich etc. Ry.*, 109 Mass. 103.

Respondents may urge that the present Southern Pacific depot was built under an express order of the Railroad Commission. The decision of the Commission in 3 C. R. C. 927, shows that the Southern Pacific *applied for permission* to build this depot and this permission was granted upon the express condition that "the approval of the Commission therefor, shall never be used as a defense against the separation of grade crossings in the State of California." When the Southern Pacific built this depot it knew, or must be presumed to have known, that it might be required to participate in the building of a union station at any time. The evidence shows that at least since 1911

there has been agitation in Los Angeles for a union depot at the site ordered by the Commission.

5. Does the Commission's requirement that the operation of trains on Alameda Street be eliminated after the construction of the union depot impair the obligation of a contract contained in a certain franchise permitting the railroads to operate trains on Alameda Street?

The record fails to disclose the exact terms of any franchise claimed by the Southern Pacific Company for the occupancy of Alameda Street. No such franchise was introduced in evidence. The report of Commission's engineering department (Commission's Exhibit 1) does however set forth what purports to be such a franchise and we may assume, as was done in the case of *Denver & Rio Grande v. Denver*, 250 U. S. 242, that the railroad is the holder of such franchise as the City of Los Angeles was authorized to grant.

It is not claimed and no claim could be made that a franchise was ever granted directly to the Southern Pacific by a special act of the legislature.

Railroad corporations obtain their franchises to exist as corporations directly from the state under the general provisions of the Civil Code of California applicable to all corporations. (Civil Code, sections 283-299.) Of these sections, sections 291-295 inclusive pertain to the incorporation of railroads. The entire subject of the corporate franchises of railroad corporations is embraced within the aforementioned sections. The franchise or authority to construct railroads upon streets and highways within the State of California is specifically granted to railroad corpora-

tions by Civil Code section 465, subdivision 5, which provides as follows:

> "Section 465. * * * Every railroad corporation has power:
>
> 5. To construct their roads across, along or upon any stream of water, watercourse, roadstead, bay, navigable stream, street, avenue or highway, or across any railway, canal, ditch or flume which the route of its road intersects, crosses or runs along, in such manner as to afford security for life and property; but the corporation shall restore the stream or watercourse, road, street, avenue, highway, railroad, canal, ditch, or flume thus intersected to its former state of usefulness as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise."

Any franchise to use the streets of the City of Los Angeles held by the Southern Pacific Company must have been acquired by virtue of this code section. But in addition to this franchise from the state, the Civil Code, section 470, requires that a railroad must obtain the consent of the governing body of an incorporated city before it can use or occupy any street therein. Section 470, Civil Code, reads as follows:

> "Section 470. No railroad corporation must use any street, alley, or highway, or any of the land or water, within any incorporated city or town, unless the right to so use the same is granted by a two-third vote of the town or city authority from which the right must emanate."

It has been held by the Supreme Court of California that a railroad can acquire no greater rights in the streets of the City of Los Angeles than the city has the

power to grant under the specific provisions of subdivision 5, section 465, Civil Code, as modified by section 470, Civil Code. In the case of *Los Angeles v. Southern Pacific Railroad Co.*, 157 Cal. 363-8, referring to these two code sections, the court said:

> "Section 470 of the Civil Code * * * is simply a limitation upon such authorization, (referring to subd. 5, sec. 465) making such a grant by the town or city authority a condition precedent to the exercise of the power given by the legislature so far as streets in incorporated cities or towns are concerned."

To the same effect, see *Simons Brick Co. v. City of Los Angeles*, 182 Cal. 230-5.

A distinction may here be drawn between a franchise in the true sense and a mere permit to occupy a particular street. Having built its railroads and engaged in the business of a common carrier of persons and property the Southern Pacific Company became the recipient of such franchise rights as the state granted under the statutes above referred to. But the determination by the City of Los Angeles of the particular streets which the railroad thus enfranchised by the state should occupy, involved no additional grant of franchise, in the true sense of the word. The only jurisdiction exercised by the city was the local police power of determining how its streets should be used by the common carrier, consistently with public covenience and safety. This distinction between a franchise in the true sense and the mere permit for the occupancy of city streets was recognized in the Su-

preme Court of California in the case of *Oro Electric Corp. v. Railroad Commission,* 169 Cal. 466-476, where it was held that the City of Stockton had no power to grant franchises to carry on the business of selling electricity to the inhabitants, but did have

> "at most, the limited power above mentioned, i. e. nothing more than the power to grant to electric corporations, the right to use its streets".

We think the same situation exists here. The Southern Pacific acquired its franchise to carry on its business as a common carrier and to operate on all highways both within and without cities, directly from the state. It can have nothing more than a permit to use the city streets of the City of Los Angeles. Such a permit is granted under the police power and the same power may modify it for the protection of the people from danger. Such change does not impair or affect the company's *franchise* to operate into Los Angeles. It simply requires it to operate into Los Angeles in a safe manner. Such a permit to use the streets is subject to the police power and must be exercised under the conditions set forth in sec. 465, sub. 5, of the California Civil Code. It is there provided that railroad corporations may construct their roads along or upon any street or highway "*in such manner as to afford security for life and property*". We submit that this is an essential and continuing condition which the railroad company must fulfil if it is to maintain its right to the use of the street. The Commission found and the Southern Pacific Company has admitted that

its road is not so constructed along Alameda Street as to afford security for life and property.

We respectfully submit that the right to the use of Alameda Street claimed by the Southern Pacific is a strictly limited one, as described by the above statute, and that it is not in the true sense a franchise. It is a permit, which, though not revocable at will, is necessarily subject to modification or even complete revocation whenever the necessities of the public require it. The city could not alienate its police power to protect its citizens from dangerous conditions arising in a public street.

We think the case of *Denver & Rio Grande R. Co. v. Denver*, 250 U. S. 242; 63 L. ed. 961, is squarely in point on this proposition and goes much further than it is necessary to go in the present case.

In that case an ordinance was enacted directing the *removal* of a railroad track from the intersection of two streets in Denver. In the present case the tracks have not been ordered to be removed, but are to be retained for freight switching.

Answering objections similar to those made in this case, this court there said:

> "The track in Wynkoop street has been there since 1871, and we shall assume, as did the supreme court of the state, that it was put there in virtue of some ordinance of that period, and that the ordinance became a contract and the right granted became a vested property right. But, as this court often has held, such contracts and rights are held subject to the fair exercise by the state,

or the municipality as its agent, of the power to adopt and enforce such regulations as are reasonably necessary to secure the public safety; for this power 'is inalienable even by express grant', and its legitimate exertion contravenes neither the contract clause of the Constitution nor the due process clause of the 14th Amendment. Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 558, 58 L. ed. 721, 726, 34 Sup. Ct. Rep. 364; Chicago and A. R. Co. v. Tranbarger, 238 U. S. 67, 76, 59 L. ed. 1204, 1210, 35 Sup. Ct. Rep. 678. * * *"

"The scope of the power and instances of its application are shown in the decisions sustaining regulations (a) requiring railroad companies at their own expense to abrogate grade crossings by elevating or depressing their tracks and putting in bridges or viaducts at public crossings (Northern P. R. Co. v. Duluth, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; Chicago, M. & St. P. R. Co. v. Minneapolis, 232 U. S. 430, 58 L. ed. 671, 34 Sup. Ct. Rep. 400; Missouri P. R. Co. v. Omaha, 235 U. S. 121, 59 L. ed. 157, 35 Sup. Ct. Rep. 82), (b) requiring a railroad company at its own cost to change the location of a track and also to elevate it as a means of making travel on a highway safe. (New York and N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437), (c) prohibiting a railroad company from laying more than a single track, in a narrow, busy street, although its franchise authorized it to lay a double track there (Baltimore v. Baltimore Trust & G. Co., 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. Rep. 696), and (d) requiring a gas company whose mains and pipes were laid beneath the surface of a street under an existing franchise to shift them to another location at its own cost to make room for a public drainage system (New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471)."

The court after discussing the reasonableness of the order holds:

> "The situation is unusual and the ordinance deals with it in a rather practical way. Giving effect to all that appears, we are unable to say that what is required is plainly unreasonable and arbitrary."

The limitation on the power of the city to alienate or restrict the exercise of the state's sovereign power of regulation is fully defined in *Home Telephone and Telegraph Co. v. City of Los Angeles*, 211 U. S. 265; 53 L. ed. 176.

6. Is the Commission's order invalid because it may require the railroads to expend large sums of money and to exercise the power of eminent domain in acquiring the necessary land and constructing a union depot?

It was urged by respondents that the order of the Commission invaded their rights under the Federal Constitution because the effect of the order was to require them to expend large sums of money and to acquire new property. It is true that the Commission's order directed respondents to procure grounds for a union depot within a specified area. To acquire the necessary property, construct a union depot and to eliminate the grade crossings as ordered will, of course, require the expenditure of considerable money. That a public utility may be required to expend money for such purposes and, if necessary, to exercise the power of eminent domain in order to perform its public utility

functions has been held, however, in the following cases:

Erie Railroad v. Board of Public Utility Commissioners, Adv. Ops. Feb. 1, 1921, No. 6, pp. 199-201;

Wisconsin M. & P. R. Co. v. Jacobson, 179 U. S. 287; 45 L. ed. 194-201, quoted with approval in *Pac. T. & T. Co. v. Eshleman*, 166 Cal. 672;

Mulke v. N. Y. & Harlem R. Co., 197 U. S. 544; 49 L. ed. 872;

Atlantic Coast Line R. Co. v. N. Carolina Corp. Com., 206 U. S. 1; 51 L. ed. 933, 945;

Mobile etc. Ry. Co. v. Mississippi, 210 U. S. 187; 52 L. ed. 1016-1024;

Grand Trunk R. Co. v. Michigan R. R. Com., 231 U. S. 470; 58 L. ed. 318;

Ala. Great So. Ry. v. R. R. Com. of Ala., 64 So. 13; 185 Ala. 354;

Lukraucka v. Spring Valley W. Co., 169 Cal. 318-333.

It was claimed that the order here under review requires the expenditure of an excessively large sum of money. Not having filed plans as directed by the Commission, it is impossible for respondents or anyone else to say what it will cost to comply with the Commission's order. That the present conditions in Los Angeles justify very extensive and costly changes is, however, clearly indicated both by the estimates of engineer witnesses and by the application filed by the Southern Pacific and Salt Lake companies in which

they sought in another way, whether less costly or not cannot yet be determined, to accomplish some of the changes and improvements directed by the Commission's order.

We respectfully submit that the decision of the Supreme Court of California here under review should be reversed.

Dated, San Francisco,
October 13, 1923.

Respectfully submitted,

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